THE FUTURE OF ADMINISTRATIVE LAW

ROBERT W. GINNANE*†

The title of this contribution at least suggests the question whether administrative law has a future. By administrative law, I mean the methods of governmental organization and procedure by which various aspects of human activity are controlled in some public interest by rules which are not primarily enforced by the courts in civil or criminal proceedings. Thus defined, administrative law runs a gamut from local quarantine and zoning controls to federal regulation of transportation, communications, securities, distribution and trading, etc. We may assume without further discussion that many of these functions of government will continue to be performed at local, state and national levels by what we call administrative agencies through what we know as administrative procedure.

However, the question of the future of administrative law is posed in part by the suggestion of the Task Force on Legal Services and Procedure of the Second Hoover Commission that after an administrative agency has explored "a new area of regulation" at least some of its functions may be transferred to a specialized court, and that:

> A third stage may come when the new body of law developed by the court of special jurisdiction has become so well integrated in the judicial system that the need for the court of specialized jurisdiction disappears, and its functions and its judges may be brought within the traditional judicial organization.[1]

In brief, it is suggested that the area of administration law can be reduced by judicializing certain administrative tasks and transferring them to the courts.

In addition, the future scope of administrative law also will be determined by the extent to which new conditions result in our legislatures assigning new regulatory tasks to the administrative process.

In my opinion, there is little likelihood of any significant shrinkage of the current tasks of administrative agencies by transferring them to courts. Rather, whether we like it or not, we are facing a steady increase in governmental controls administered by administrative agencies through administrative procedures.

The suggestion that significant areas of the operations of administrative agencies can be transferred to the courts rests upon the mistaken assumption that after a stage of pioneering in a new regulatory area, the

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* General Counsel, Interstate Commerce Commission; member of the bars of the United States Supreme Court and the State of New York.

† The opinions expressed are those of the author and do not necessarily represent the views of the Interstate Commerce Commission.

[1] TASK FORCE REPORT ON LEGAL SERVICES AND PROCEDURE, COMMISSION ON ORGANIZATION OF THE EXECUTIVE BRANCH OF THE GOVERNMENT 241-242 (1955).

problems are solved and new rights and interests are so defined and stabilized that non-expert judges may replace the specialized administrators who are no longer needed. It is easy to demonstrate that existing administrative agencies are and will be struggling with problems substantially different than those which led to the creation of such agencies. The labor law of the future may be as much concerned with union management and welfare funds and the effect of non-transferable pension rights upon the mobility of labor, as with unfair labor practices by employers. Financial regulation may be more concerned with the exercise of economic power by managers of great pension trusts[2] than with the activities of investment bankers. As a specific example, the regulatory problems which largely absorb the attention of the Interstate Commerce Commission today are relatively new—arising out of the bitter competition between railroads, the new motor carrier industry and a revived inland water transport system. They bear little resemblance to the old problems created by the railroads' former monopoly of inland transportation. Thus, the current controversy over rate making policy relates to competitive *minimum* rates rather than to *maximum* rates for the protection of shippers.[3]

Since the administrative agencies are largely concerned with new problems resulting from changing conditions, rather than simply applying settled stabilized rules to familiar fact situations, there would seem to be little likelihood of a significant transfer of functions to courts. Moreover, the renewed judicial emphasis upon the primary jurisdiction of administrative agencies over certain types of questions presented to the courts is a trend directly opposed to the suggestion of the Task Force on Legal Services and Procedure.[4]

At the same time, it is certain that foreseeable social and technological changes will necessitate additional governmental controls, many of which will be entrusted to administrative agencies. For purposes of this discussion, let us define the future as 2000 A.D., forty-two years from now. In terms of projecting a trend from the last forty-two years, since 1916, it would be a sobering thought to anticipate a similar and continuing proliferation of government controls and agencies. However, such a projection in the abstract would be entirely unrealistic—and might never occur. Rather, the question is whether the social and other conditions of 2000 A.D. will produce a need or demand for governmental regulation of matters which today are governed by the preferences and choices of private persons.

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[2] A. BERLE, JR., ECONOMIC POWER AND THE FREE SOCIETY 10-12 (1957).

[3] See *e.g.*, REPORT OF THE SUBCOMMITTEE ON SURFACE TRANSPORTATION OF THE SENATE COMMITTEE ON INTERSTATE AND FOREIGN COMMERCE, PROBLEMS OF THE RAILROADS 12-13 (1958).

[4] United States v. Western Pacific R. Co., 352 U.S. 59 (1956); United States v. T.I.M.E., Inc., 252 F.2d 178 (5th Cir. 1958); United States v. Davidson Transfer & Storage Co., decided April 24, 1958 (D.C. Cir.).

To begin with, the biggest explosion going on today is not the hydrogen bomb—it is the world-wide population explosion. Briefly, and at the risk of oversimplifying complex matters, improved nutrition and medical care have produced a drastic reduction in the age-old infant mortality rate and an equally drastic increase in the average life span. "Gerontology" is a new and significant word. Tuberculosis, syphilis, polio and malaria are disappearing. The matter is sufficiently illustrated by the population trend of the United States, as follows: 1900—76 million, 1920—106 million, 1940—132 million, 1950—151 million; estimated population in 1975 (varying with different assumptions) 206-208 millions.[5]

The population of the United States in 2000 A.D. will not produce anything like the present population densities of the Netherlands, Puerto Rico or Japan. Even before then, however, it will have resulted in far-reaching control of water use, unless and until fresh water can be produced cheaply enough from the sea. In any event, there will be increasing regulation of water and air pollution. If there is confirmation of the suspicion that carbon dioxide resulting from combustion may create profound climate changes, control of emission of carbon dioxide from combustion would represent a new and unwelcome form of government regulation.

Inevitably, increasing population will result in increasing control of the use of land. Municipal zoning regulation is familiar. Already, larger governmental units such as counties are formulating development plans under which certain areas are limited to prescribed industrial, commercial, residential or recreational use. Watershed protection and soil erosion are but two of the factors which probably will lead to restrictions on the use of much of the nation's land. The ultimate possibilities in this direction are illustrated by the English legislation under which a farmer may be placed under supervision, or even forced from the land, for failure to meet prescribed standards of farming.

A different group of problems is being created by recent technical developments. Thus, it is clear that the operation of nuclear reactors and the handling of radioactive materials will be under close governmental control. The transportation and disposition of radioactive wastes are already expensive and troublesome matters. The recent rash of injuries to youthful rocket builders, experimenting with exotic fuels, suggests not only that the manufacture and use of such fuels must be restricted to qualified persons, but also that in a populated area there can be no such thing as an uninhibited right to launch rockets. On a more mundane level, the increasing volume of aircraft movements is about to result in rigid federal control of air space.

It is perfectly clear that many of these foreseeable problems will be dealt with by our federal and state governments through adminis-

[5] STATISTICAL ABSTRACT OF THE UNITED STATES 5-6 (1957).

trative agencies applying broad legislative policies. Few will be susceptible to the relatively simple treatment of criminal prohibitions enforced by the courts, or to any other form of specific legislative decision. In brief, by 2000 A.D. the field of administrative law will be substantially greater than it is today.

The principal concern of the Hoover Commission and of the American Bar Association has been with the procedures of the federal regulatory agencies. At the present time, there exists a well-defined body of general principles in federal administrative law. It is found in court decisions of general applicability and in the Administrative Procedure Act. It is well-defined in the practical sense that (leaving aside a few intricate problems such as primary jurisdiction) informed lawyers have an instinctive feel as to the rules which control a particular procedural situation. Stated otherwise, the significant litigation over procedural matters in recent years has related, not to the content of such principles, but rather to the extent to which they should be applied in areas, such as passport administration, which historically have been regarded as involving only executive discretion.

The most significant proposal of the Task Force on Legal Services and Procedure and of the American Bar Association consists of a Code of Federal Administrative Procedure, which would completely rewrite the present Administrative Procedure Act to apply more detailed and restrictive requirements to the federal administrative agencies. Thus, the Task Force stated that in drafting the Code it was guided by major policy considerations which included the following propositions: "The more closely that administrative procedures can be made to conform to judicial procedures, the greater the probability that justice will be attained in the administrative process"; "Formalization of administrative procedures along judicial lines is consistent with efficiency and simplification of the administrative process"; and "The administrative process is improved and rendered more fair and efficient by uniform standards and forms of procedure."[6] These principles were applied in its proposed code (1) to provide for immediate litigation over every exercise of investigatory powers by an agency, (2) to permit judicial review at any stage of administrative proceedings of a claim that the agency was acting outside its jurisdiction, (3) to prohibit agency heads from consulting in the process of decision with any agency employee except members of an independent review staff, and (4) to dilute the responsibility of agency heads by giving a high degree of finality to hearing examiners' findings of fact, on the one hand, and by broadening the scope of judicial review, on the other.

I predict that at the very least Congress will sharply cut down proposals embodying such principles in the light of such considerations as the following:

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[6] *Supra* note 1, at 138.

(1) The most serious and valid criticism of federal administrative procedure is delay—and the resultant injury to the public interest and to private parties. All too many administrative proceedings consume years instead of months. The causes of such delays are complex—as are the causes for similar delays in judicial administration. Nevertheless, Congress is aware of these delays and will scrutinize every proposal for significant changes in existing procedures for tendencies to increase or minimize existing delays and costs.

(2) Generally, regulatory functions can be carried out in accordance with almost any conceivable procedural rules—if the nation is ready to provide the agencies witht sufficiently large staffs. The Congress will be instinctively opposed to any procedural changes which threaten to require increases in the appropriations for administrative agencies.

(3) The rules of administrative procedure must be kept sufficiently flexible to permit the shaping of procedures to a great variety of proceedings which vary widely in the stakes involved, in their impact upon private interests, and in the need for expedition.

In suggesting that none of the codes of administrative procedure thus far proposed is likely of enactment without major revision, I do not at all suggest that the movement for improvement of administrative procedures will be ineffective. Rather, I suggest that improvement will come *via* other routes. I believe that we probably have seen the end of major statutory changes made as the result of *ad hoc* studies such as those of the Attorney General's Committee on Administrative Procedure in 1940 and the Task Force on Legal Services and Procedure in 1954-1955. We can be reasonably confident that the trend in this country will rather be in the direction of continuous studies to improve particular administrative procedures, with uniformity of procedure a secondary objective. The first great step in this direction was the creation in 1956 of an Office of Administrative Procedure in the Department of Justice to act as a nucleus for such studies. This was done in accordance with the 1954 recommendation of the President's Conference on Administrative Procedure, which revived the earlier suggestion of the Attorney General's Committee on Administrative Procedure in 1941. It is significant that both the Hoover Commission and the American Bar Association have also endorsed the creation of such an office, although varying as to its location, structure and functions.

It is interesting to note that a similar course has been charted for the United Kingdom by the 1957 Report of the Committee on Administrative Tribunals and Enquiries. The Committee specifically rejected proposals for a "standard code of procedure" for the following reasons:

> Because of the great variety of the purposes for which tribunals are established, however, we do not think it would be appropriate to rely upon either a single code or a small number of codes. We think that there is a case for greater procedural differentiation and prefer that the detailed procedure for each type

> of tribunal should be designed to meet its particular circumstances.

While the Committee stated a number of general principles applicable to all or some tribunals, its principal recommendation was for the creation of two Councils on Tribunals (one for England and Wales and one for Scotland) whose functions:

> . . . should be to suggest how the general principles of constitution, organization and procedure enunciated in this Report should be applied in detail to the various tribunals. In discharging this function they should first decide the application of these principles to all existing tribunals; thereafter they should keep tribunals under review and advise on the constitution, organisation and procedure of any proposed new type of tribunal. We recommend that any proposal to establish a new tribunal should be referred to the Councils for their advice before steps are taken to establish the tribunal. The Councils should have power to take evidence from witnesses both inside and outside the public service, and their reports should be published.

In brief, the Committee rejected rigid procedural uniformity in favor of a more flexible and continuous process of improvement sparked by something like the Office of Administrative Procedure.

Given a machine for continuous study for the more subtle aspects of administrative machinery, there is much to be done. For example, the effective organization of a large staff to assist in the decision of many cases, without staff usurpation of the duties of the agency heads, is a complicated matter. I suspect that careful studies of the internal agency procedures for making decisions might result in improved techniques for providing agency heads with more effective staff assistance which will at the same time focus their personal attention on the real issues in cases. More broadly, there is a need for analysis of the internal management aspects of administrative law—as distinguished from its external aspects as embodied in rules of procedure. The causes of delay and unnecessary expense may be found in an agency's organization of its staff. Improved organization of existing personnel may produce both expedited and better decisions. Other studies will enable procedures to be shaped to meet unusual needs for expedition and to handle large numbers of cases. Briefly, administrative procedures involving thousands of cases annually must be viewed from the point of view of management as well as with a view to achieving a fair result in a particular case. Indeed, the judicial system in New Jersey and elsewhere is already applying this approach.

Moreover, existing delays in the administrative process and the certain growth in the business of administrative law inevitably will lead such an Office of Administrative Procedure (or someone else) to inquire whether our existing procedures—based in large part on the concept of a trial or hearing—are necessarily the best way to determine any and

all issues. I wonder if we are not already obsessed with procedure as such, rather than with getting things done within a reasonable time and at a reasonable cost. Is it not time to make some "concessions to the shortness of human life," and to the fact that the little fellow simply can't afford years of administrative and judicial litigation? Some years ago it was estimated that the cost of obtaining a certificate of public convenience and necessity under the Civil Aeronautics Act averaged $750,000. A cynic might request a demonstration that prolonged route hearings—in which practically every air carrier intervened to oppose the applications of everyone else—produce a substantially fairer or wiser allocation and distribution of routes than would have resulted from written presentations followed by prompt decisions which were based frankly upon judgment and economic prediction. Similarly, he might like to see a demonstration that the great volume of formal hearings conducted by the Interstate Commerce Commission to determine the lawfulness of competitive minimum rates produces significantly more accurate results than would a process of prompt and admittedly hunch decisions based upon limited materials. He might argue that "cost" is such a delusion and disputed matter of accounting conventions and overhead allocations as to leave doubt as to how much time and money should be devoted in attempting to ascertain "cost." Considering the admitted value of public hearings and trial-type procedure as safeguards against error and oppression, this is an extremely difficult question. I only suggest that study and some cautious experimentation would be valuable in determining whether we are in danger of carrying the concept of "decision on the record" to a point which assumes that specialized administrators are half-wits and that the public can afford expensive procedure indefinitely prolonged.

Again, going beyond the strict field of procedure, a study of the effectiveness and necessity of various types of administrative sanctions would seem to be due, particularly if we are going to subject ourselves to an increasing volume of government regulation.

Turning from matters of strict procedure, we find that both the Task Force on Legal Services and Procedure and the American Bar Association have made significant proposals on related matters of government organization and personnel. I have already referred to the suggestion that certain functions of administrative agencies may be transferred to the courts. To the extent that this suggestion is based upon considerations relating to the constitutional separation of powers, it invokes indirectly the old controversy over the "headless fourth branch of government," or whether the functions now exercised by the independent regulatory commissions should be lodged in the executive departments under the general supervision of the President. While this issue has not been raised by the Task Force or by the American Bar Association, it is regularly revived by such proposals as the establishment of a Depart-

ment of Transportation to embrace the present functions of the Interstate Commerce Commission and the Civil Aeronautics Board. Such major organizational changes appear unlikely to find Congressional acceptance in the near future. This is indicated by the fact that one of the objectives of the current investigation by the Special Subcommittee on Legislative Oversight of the House Committee on Interstate and Foreign Commerce is to ascertain whether the regulatory commissions have been influenced by the executive branch of the government. Indeed, misgivings as to possible executive branch control or influence upon such commissions have led some persons to oppose placing in the Department of Justice an Office of Administrative Procedure with only advisory functions.

It is a matter for encouragement that both the Task Force and the American Bar Association have placed new emphasis in their proposals upon the problem of adequately staffing federal administrative agencies. It is not enough to say that procedural codes cannot make men wise and honest. The next question is whether the administrative process is as well staffed as it can be. It is only recently that serious attention has been given to this matter. One of the purposes of the Administrative Procedure Act was to improve the calibre of federal hearing examiners. This task was assigned to the Civil Service Commission, but without the guidance of any settled views in the bar or in Congress as to how it should be done. The proposed Administrative Practice Reorganization Act, sponsored by the American Bar Association, would deal further with the recruitment of hearing examiners and, in addition, contains detailed provisions for a legal career service in the federal government. Specifically, the bill proposed substantial salary increases for federal hearing examiners and lawyers. This is weighty recognition of the necessity for adequate salaries and other conditions if the regulatory agencies are to attract and keep able lawyers. However, it is probably impossible to single out lawyers and hearing examiners for salary increases. To do so would create serious inequities with respect to other professional groups in the federal service, and would overlook the fact that the federal agencies have both the same needs and current difficulties in recruiting, for example, competent engineers, accountants and rate experts. Nevertheless, there is an encouraging recognition of the need for more realistic federal personnel policies which are bound to assist the administrative agencies in attracting qualified professional people.

As this is written (in the spring of 1958), the Subcommittee on Legislative Oversight of the House Committee on Interstate and Foreign Commerce is investigating the operations of ICC, SEC, FPC, CAB, FCC, and FTC. The results of this investigation to date suggest that it will be shown that a very few members of these agencies have been willing to listen to off-the-record advocacy in cases required by law to be determined solely upon the evidence and argument received in a formal hearing. Such an investigation and such disclosures are as

healthy as surgery for cancer in an early stage. It will be tragic, however, if a few examples of corrupt or mistaken conduct are seized as the pretext for enacting into law a mass of restrictive rules of administrative procedure. Only a brief historical perspective reminds us that since 1935 the federal judiciary has been visited with as many and as severe scandals in terms of outright corruption as have the federal administrative agencies. Happily, those atypical incidents did not result in radical revision of the Judicial Code and the Federal Rules of Civil and Criminal Procedure.

To date, the Federal Communications Commission has had top billing before the Subcommittee on Legislative Oversight. It is curious to note, however, that in 1952, the Communications Act was drastically amended to write into it many of the principles of the codes of administrative procedure which have been proposed recently. Is it possible that we have here another example of the bankruptcy of trying to legislate wisdom and integrity by rules of procedure? However, it has been suggested that agency members would be assisted in refusing to receive such communications by the adoption of rules of ethics, presumably patterned on the Canons of Judicial Ethics, applicable to cases in which the agency, like a court, is required to base its decision upon the evidence and argument received in formal proceedings.

Conclusion

American administrative law, at federal, state and local levels, will continue to be the method by which increasing government controls over human activity are exercised. The fair and wise exercise of such powers will be more important than ever. With the establishment and refinement of flexible statutory codes of procedure, new emphasis will be placed upon improvement of the internal procedures of regulatory agencies and, within limits, to applying the techniques of management to the problem of deciding thousands of proceedings. This development will present to the legal profession the same kind of challenge that it has already started to meet in the area of judicial administration.